No. 12,812

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH C. PATTERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

On September 29, 1950, the Grand Jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging Joseph C. Patterson with violations of the law against bribery (Section 201, Title 18, U.S.C.) as follows:

> "That on or about the 19th day of August, 1950, in Division Number One, Territory of Alaska, Joseph C. Patterson did knowingly, wilfully, unlawfully and feloniously offer and give John Roger Lamb the sum of One Hundred Eighty Dollars ($180.00) in lawful money of the United States, said John Roger Lamb being a person acting for and on behalf of the United States

in an official function, under and by authority of the Fish and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Mink Arm, Boca de Quadra, Alaska, then and there closed to commercial fishing for salmon, to report and disclose of officials of said Fish and Wildlife Service and other law enforcement officials and to arrest and cause the arrest and prosecution of, all persons fishing illegally for salmon in said closed area; knowing said John Roger Lamb was a person acting for and on behalf of the United States in an official function with duties as aforesaid, and with the intention on the part of said Joseph C. Patterson to influence and induce John Roger Lamb to do an act of violation of his lawful duties; that is to say, to unlawfully refrain from and omit to report and disclose to officials of the Fish and Wildlife Service and other law enforcement officials, that said Joseph C. Patterson did fish illegally in said area closed to commercial fishing for salmon, and to refrain from arresting or causing the arrest and prosecution of said Joseph C. Patterson for illegally fishing in said area."

The indictment contained a second count, charging a second bribe in the amount of $100.00 on August 21, 1950, given to the same official of the Fish and Wildlife Service, in substantially identical language. (R 3-5.)

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Sections 1291 and 1294, Chapter 83, New Title 28, U.S.C.

STATEMENT OF THE CASE.

Joseph C. Patterson, appellant, is a resident of Ketchikan, Alaska, where he was engaged in operating a restaurant known as the 400 Club. (R 207.) In September of 1949, appellant acquired a one-half interest in a commercial fishing boat called the Rolling Wave, the other half being purchased at the same time by a friend, William N. Tatsuda. (R 263.) Neither appellant nor Tatsuda used the boat in commercial fishing during the 1949 season; in fact, appellant had never engaged in commercial fishing prior to the 1950 season. (R 240.)

John Roger Lamb was an employe of the Fish and Wildlife Service, a branch of the United States Department of the Interior, during the summer of 1950. (R 59.) Lamb was employed as a Deputy Enforcement Agent on June 7, 1950, and was continuously so employed until August 22, 1950. He had worked in a similar capacity during the two previous fishing seasons, those of 1948 and 1949, and as such, was an official, or employe of the United States Government serving in an official function. (R 60.)

In the late Fall of 1949, Lamb approached Tatsuda and intimated to Tatsuda that he had been "selling

fish" out of the area in which he was employed as a stream watchman during the summer of 1949; or, more explicitly, that he had been taking bribes to permit illegal fishing. Lamb went on to state that he was going to "work it differently next season if he got the same job back". (R 262.) He indicated that he planned to work with just one or two boats instead of letting everybody come in. (R 262.) Early in June, 1950, Lamb again approached Tatsuda and urged Tatsuda to send the Rolling Wave down to the area where Lamb was employed as stream watchman "to get in on an early run of Sockeyes." (R 263.) Lamb told Tatsuda that, "if he had a boat down there last year he would have made a young fortune; I believe that is what he said, a young fortune; and that this year he was trying to get a boat lined up to go down and fish the stream during that time before the regular season opened up". (R 264.) Tatsuda made no deal with Lamb.

When employed for the 1950 season, Lamb was assigned as stream watchman in Mink Arm of the Boca de Quadra area, his primary duties being to prevent illegal commercial fishing within closed waters. (R 60-61.) He left Ketchikan to go to his work in the Boca de Quadra on June 8, 1950. (R 105.) About a month later, Lamb returned to Ketchikan to purchase groceries and pick up other supplies. (R 65, R 103.) On that occasion, Lamb went to the grocery store being operated by Tatsuda and there engaged in a conversation with Tatsuda and appellant concerning illegal fishing in the Boca de Quadra.

(R 229.) Lamb informed appellant that he was now the stream watchman in the Boca de Quadra, and solicited appellant to bring the Rolling Wave out to that area and there engage in illegal fishing. In the course of conversation, Lamb said: "there is a lot of money to be made out there this year"; "I made a lot of money out there last year"; "I am only going to work with one or two boats this year instead of letting everyone in like I did last year"; "why don't you fellows bring the Rolling Wave down there and fish the stream, and we will all make some money"; "you don't have to worry any about getting caught. It will be fixed". (R 229-230.) Tatsuda and Patterson did not make any "deal" with Lamb. (R 230.)

In August, Patterson completed equipping the Rolling Wave for commercial fishing and engaged a crew. (R 231.) The Rolling Wave left Ketchikan at about noon on August 14, the day prior to the opening of the season, and proceeded to a point near Cygnet Island in the Boca de Quadra area. (R 232.) As the Rolling Wave approached Cygnet Island, Lamb came out to the boat in a skiff equipped with an outboard motor, and proceeded to board the Rolling Wave. On this occasion, Lamb again urged appellant to engage in illegal fishing in the closed area of the Boca de Quadra. (R 234.) Appellant again refused: "John Lamb said there was quite a few fish up in the creek, a lot of money to be made, and he had everything fixed if we did come up and catch them, so he repeated this with other suggestions dur-

ing this about a mile or a mile and one-half run, and we tied up, and all of the crew, we talked about it to them, and I didn't want to do it. The crew didn't want to do it. So we told him no; that was about all of it". (R 234.)

Lamb left the Rolling Wave, but returned to it again on the same evening. (R 235.) Again he renewed his solicitation of Patterson, while appellant was washing dishes in the fo'c'sle. Lamb assured Patterson that there was a great deal of money to be made. He stated that he had made enough money "last year selling fish out of the creek to pay all his bills, buy a troller and seven-thousand-dollar home in Washington". (R 236.) He assured Patterson that he had other agents in the area "fixed". (R 236.)

On August 15, the Rolling Wave left the Boca de Quadra, and fished in the vicinity of Lucky Cove or Point Alva. (R 237.) On either the 15th or 16th of August, Lamb came alongside the Rolling Wave in a Fish and Wildlife Service boat referred to as the "Chris-Craft" and tied up for a few minutes. Lamb was accompanied by Richard Warner, another Fish and Wildlife agent, and introduced him to Patterson. Lamb then said in Warner's presence, "I just wanted to prove to you that everything is fixed", and "There are a lot of fish up there tonight. If you guys want to go up there and fish, there is nothing to worry about. We have the light signal all figured out." (R 238.) This was affirmed by Warner, indicating acquiescence in the "fix". (R 238, 136-137.)

During the evening of August 16, Lamb boarded the Rolling Wave for the fourth time and again urged his scheme for illegal fishing upon Patterson. Upon this occasion, finally, Patterson agreed to go along with the proposition, and the amount of the bribe to be paid Lamb and the other agents was, at Lamb's suggestion, set at $100.00 per thousand fish illegally taken by the Rolling Wave. (R 239.)

Appellant then proceeded to fish in the closed areas on two or three occasions, and paid Lamb according to their understanding. (R 239-240, 242-244.)

Lamb had no intention of arresting appellant, or causing his arrest; he intended to go through with the deal and make as much money as possible. (R 118.) Early in August, however, and before any deal had been made or any bribes given, Lamb's superiors in the Fish and Wildlife Service learned of his activities. (R 134-135, 147-149.)

Warner claimed to have heard of some kind of deal between Lamb and appellant before leaving Ketchikan to go to the Boca de Quadra. (R 134-135.) He made a report to his superior officer in the Fish and Wildlife Service, John D. Wendler, on August 9 (R 198-199), and the information was immediately passed on to the United States Attorney and the Federal Bureau of Investigation. (R 149.) Wendler instructed Warner, and his companion agent on the Chris-Craft, Eugene Cottrill, to "go ahead and see what happened". (R 156.) Wendler also made preparations to apprehend the Rolling Wave by sending

agents Robert Halstead and Charles Graham to the area to observe any illegal fishing which might occur. (R 195.) Warner and Cottrill ostensibly entered into the deal with Lamb, and led Lamb and appellant to believe that they would like to be "cut in" and would accept a "split" of the bribe. (R 137, 142, 153-154.) This understanding with Lamb was reached on the evening of August 13.

Appellant had never fished commercially prior to the season of 1950; before Lamb approached him he had never had any intention of fishing illegally or of bribing a stream watchman. (R 240.) Although appellant had been convicted of such misdemeanors as gambling and selling liquor without a license in September, 1948 (R 250-251), and had been convicted of other misdemeanors (soliciting gambling and disorderly conduct) in San Diego in 1937 and 1943 (R 254), there was no evidence that he had ever engaged in any previous acts of bribery or illegal fishing, or formed any intent to do so. John F. Van Gilder, a resident of Ketchikan for twenty years, testified that the general reputation of appellant in the community for honesty and integrity was "the very finest". (R 322-323.) This testimony was not contradicted nor shaken. (R 323-335.)

At the conclusion of the Government's evidence, appellant moved the Court for a judgment of acquittal, and argument was presented that entrapment had been established by the testimony of the Government witnesses. The motion was denied (R 205), and was renewed and denied at the conclusion of all the evi-

dence. (R 337.) Thereafter, the defendant presented three proposed instructions, which were refused. (R 6-8.) The jury was instructed, and exceptions were taken to the instructions, specifically pointing out the errors in the instructions on entrapment. (R 339, 8-24.)

The jury retired to consider the case at 3:25 o'clock on the afternoon of October 25, 1950. (R 339.) After deliberating all night, at 10 o'clock the following morning the jury reported that they were dead-locked and requested further instructions on entrapment, whereupon the Court gave "Supplemental Instructions to The Jury" on entrapment, and exceptions, both specific and general were taken. (R 340, 24-26.) At 3 o'clock that afternoon, the jury, having reported that they were hopelessly dead-locked, the Court gave its Second Supplemental Instructions to The Jury, and instructed the jury that they need consider no other instructions on the subject of entrapment. (R 341-342, 27-30.) Exceptions were taken to this instruction. (R 342-343.) At 4:10 in the afternoon on October 26, 1950, the jury returned their verdicts, finding defendant guilty as charged in both counts of the indictment. (R 343.) The defendant moved for a judgment of acquittal notwithstanding the verdict, on the grounds that the Court had erred in its instructions on entrapment, and that the jury had been coerced into a verdict by the repeated prejudicial instructions of the Court. (R 344.) The defendant moved for a new trial which was denied (R 346), and on October 30, 1950, the Court rendered its judgment

and commitment that appellant be imprisoned in the Federal Penitentiary at McNeil Island, Washington, for a period of two years on each count, the sentences to run concurrently, and to pay a fine of $300.00 on each count. (R 31-32.) This appeal followed.

STATEMENT OF POINTS RELIED UPON.

1. That the Court erred in denying defendant's motion for a judgment of acquittal, made at the conclusion of the evidence offered by the Government.

2. That the Court erred in denying defendant's motion for judgment of acquittal, made at the close of all the evidence.

3. The following portion of Instruction No. 1 of the Court's Second Supplemental Instruction was prejudicial and erroneous in that it holds in effect that if the defendant were motivated by a desire for personal gain, such motivation constituted insufficiency of inducement, so as to make unavailable to the defendant the defense of entrapment:

> "* * * The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say.
>
> "The defendant testified that he paid one bribe on August 17, another on the 18th and the third

on the 21st. *If you find that the defendant was induced to bribe, not for personal gain, but because his will power and judgment had been overcome by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure to commit the first bribery.*

"If you find from the evidence that the defendant offered a bribe to Lamb or had the intent to commit the crimes charged or either of them, or accepted Lamb's proposal, not because he was induced to accept it but from a desire for personal gain or from the fear of losing an opportunity for profit, then the defense of entrapment would not be available and you should find the defendant guilty regardless of whether Lamb urged, encouraged or cooperated with him in the commission of the crimes involved.

"The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, from a desire for personal gain or from the fear of losing an opportunity to profit or whether his will power and better judgment were so overcome by Lamb that he was induced to commit the crimes charged without having had any previous intention to do so. To illustrate, if 'A', a custodian of government property tell 'B' that he will allow him to steal for a percentage of the profits from the sale thereof, then there would be no entrapment even though 'A' told 'B' that it was an excellent opportunity for making a lot of money. On the other hand, if 'A'

told 'B' that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced 'B' to steal for the accommodation of 'A', which otherwise 'B' would not even have contemplated, it would be entrapment."

4. That the Court erred in refusing to give the following proposed instructions on behalf of the defendant:

DEFENDANT'S PROPOSED INSTRUCTION NO. 1.

"It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

"If the jury are satisfied that prior to the commission of the acts alleged that the defendant never conceived any intention of committing these offenses or any similar offenses, but that the officers of the government incited and by suasion and representations lured him to commit the offenses alleged in order to entrap, arrest, and prosecute the defendant therefor, then these facts are fatal to the prosecution of these offenses, and the defendant is entitled to a verdict of not guilty."

DEFENDANT'S PROPOSED INSTRUCTION NO. 2.

"As the Government has the burden of proof throughout this trial, if you have any reasonable doubt of the defendant's having been lured by entrapment, as I have heretofore defined that term, into the commission of the offenses charged, when theretofore he had no such intention, he is not guilty of any offense and should be acquitted."

5. That the verdict is contradictory to the weight of the evidence.

6. That the verdict is not supported by substantial evidence.

7. That the Court erred in denying the defendant's motion for a new trial.

8. Other manifest errors appearing of record, to which objection was taken, particularly the action of the Court in restricting testimony as to the previous record of the defendant, and the activities of the Government agents.

ARGUMENT.

The first three points raised, and points five, six and seven, will be discussed together, since they relate to the defense of entrapment and to the evidence justifying an acquittal.

The essential principles of the law of entrapment have been enunciated and reviewed by this Court and other Courts of the United States on numerous oc-

casions. See *O'Brien v. United States* (CCA 7th, 1931) 51 F.(2d) 674, and extensive collection of authorities at page 678. This Court has examined the defense on at least eight occasions since its decision in *Woo Wai v. United States* (CCA 9th, 1915) 223 Fed. 412. See, *Peterson v. United States* (CCA 9th, 1919) 255 Fed. 433; *Sam Yick v. United States* (CCA 9th, 1917) 240 Fed. 60; *Orsatti v. United States* (CCA 9th, 1925) 3 F.(2d) 778, cert. den., 268 U.S. 694; *Meyers v. United States* (CCA 9th, 1933) 67 F.(2d) 223; *Ratigan v. United States* (CCA 9th, 1937) 88 F.(2d) 919, cert. den. 57 S. Ct. 938; *Louie Hung v. United States* (CCA 9th, 1940) 111 F.(2d) 325; *Farber v. United States* (CCA 9th, 1940) 114 F.(2d) 5, cert. den. 61 S. Ct. 173; *Stein v. United States* (CCA 9th, 1948) 166 F.(2d) 851.

The elements of the defense of entrapment, as found in these cases and the many others on the subject, may be briefly stated as follows: No conviction can be had where it appears that: (1) The criminal design originated with an official or agent of the Government and (2) was by such agent implanted in the mind of an hitherto innocent person, who was then (3) persuaded, lured, or enticed into the commission of the crime (4) in order that the Government might then proceed to arrest, prosecute and convict for the crime committed. The defense is based squarely on the ground that it is "contrary to public policy" and "shocking to the sense of justice" to enforce a criminal statute under such circumstances. *Sorrells v. United States* (1932) 287 U.S. 435, 53 S. Ct. 210, 77

L. Ed. 413, 86 ALR 249. As Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said in *Butts v. United States,* 273 Fed. 35, 38:

> "When the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never formed any intention of committing the offense prosecuted or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefore is and and ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty (citing cases) * * * The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the likes of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it."

The defense has been raised in a variety of situations out of which some refinements have grown. Thus, the defense is not available where the Government agents do not instigate but merely "provide an oppor-

tunity'' for a crime to be committed. *Farber v. United States,* supra; *Louie Hung v. United States,* supra; *United States v. Spadafora* (CCA 7th, 1950) 181 F. (2d) 957; *Stein v. United States,* supra; *Browne v. United States* (CCA 6th, 1923) 290 Fed. 870; *Scriber v. United States* (CCA 6th, 1925) 4 F.(2d) 97; *Ratigan v. United States,* supra.

At least in some types of cases, the Government agent may ''make the first move'' toward the commission of the crime without providing a defense of entrapment. This is generally true where the agent has reasonable grounds to believe that the suspect is (1) already engaged in an existing course of similar criminal conduct, or (2) has already formed a design to commit the particular crime or similar crimes, or (3) is ready and willing to commit the particular crime ''as evinced by ready complaisance'' in the criminal plan. *United States v. Becker* (CCA 2d, 1933) 62 F.(2d) 1007, 1008. Certainly, where the accused is regularly engaged in the line of criminal conduct, it is permissible to provoke him into a particular act which is only one of a uniform series. *United States v. Becker,* supra; *United States v. Chiarella* (CCA 2d, 1950) 184 F.(2d) 903. Examples of this nature frequently arise in connection with the illicit sales of narcotics or liquor.

POINT I.

THE APPELLANT WAS ENTRAPPED AND WAS ENTITLED TO A JUDGMENT OF ACQUTTAL.

On the evidence, measured by these principles, the Court erred in refusing to grant appellant's motion for a Judgment of Acquittal, made at the close of the government's evidence and renewed at the close of all the evidence.

When the defense of entrapment is advanced, it becomes incumbent upon the prosecution to prove beyond a reasonable doubt that no entrapment has in fact taken place. *Ryles v. United States* (CCA 10th, 1950) 183 F.(2d) 944 (instruction approved "* * * the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment." 945); *Heath v. United States* (CCA 10th, 1948) 169 F.(2d) 1007, 1010; *Gargano v. United States* (CCA 5th, 1928) 24 F.(2d) 625, 626.

There is a question for the jury only where there is a substantial controverted issue of fact with regard to the existence of one or more of the essential elements of entrapment. If the evidence conclusively shows entrapment, or is uncontroverted, the defendant is entitled to a directed verdict or judgment of acquittal. *O'Brien v. United States,* supra; *Morei v. United States* (CCA 6th, 1942) 127 F.(2d) 827; *United States ex rel. Hassel v. Mathues* (D.C. Pa., 1927) 22 F.(2d) 979 (defendant will be released on habeas corpus where entrapment is established); *United States v. Lynch* (D.C. N.Y., 1918) 26 Fed. 983; com-

pare, *Louie Hung v. United States,* supra ("It is enough to say that the showing of entrapment was not so clear as to entitle appellant to an acquittal as a matter of law." 111 F.(2d) at page 325); and Roberts, J., concurring in *Sorrells v. United States,* supra ("Proof of entrapment, at any stage of the case, requires the Court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty." 287 U.S. 435, at 457).

So, in the present case, the following facts were conclusively established: (1) the whole idea of illegal fishing and bribery to permit it originated with Lamb, the government agent. He approached not only Paterson and Tatsuda, but also Klingbeil and Lindsey with the same idea. Appellant (R 227-230), Tatsuda (R 260-263, 265-266), Klingbeil (R 279-282), Lindsey (R 289-292), Maltsberger (R 310-314), and Russell (R 302-303) all testified that Lamb took the initiative and was the originator of the criminal scheme. *This testimony was not denied.* When questioned about these vital conversations, Lamb took refuge consistently behind the stock answers, "I don't recall that" or "I don't believe I did," or "I don't remember as I did." (R 96, 97, 98, 101, 103, 105, 106, 107, 112, 113, 118, 119, 121, 219, 226.)

(2) Lamb, an official of the United States, implanted the corrupt scheme in the mind of appellant, who was then entirely innocent of any intent to fish illegally or engage in bribery to do so, who had never engaged in any such course of criminal conduct, and who evinced no "ready complaisance". The prose-

cution made not the slightest attempt to prove that appellant had ever engaged in any previous bribery schemes, or ever intended to do so until approached by Lamb.

(3) Lamb persuaded and enticed appellant to fish illegally and pay a bribe for the privilege. The evidence shows that Lamb solicited appellant on five or six separate and distinct occasions; repeatedly he urged upon him the large amounts of money to be made by proceeding with the scheme. Repeatedly appellant rejected Lamb's importunities; on the final occasion he yielded. Compare, *Peterson v. United States,* supra (repeated solicitations to sell beer).

(4) The intention of the government officials was to arrest and prosecute appellant for bribing Lamb. Warner was instructed to "go along" with Lamb; he acquiesced in the scheme in appellant's presence. (R 136-137.) Wendler knew the situation on August 9, and laid the plans for arrest. (R 195, 198-199, 201-202.) The United States Attorney and the Federal Bureau of Investigation had been alerted. (R 149.) The witnesses were placed in position, door ajar, to "await the downfall and ignominy of the victim". *O'Brien v. United States,* 51 F.(2d) 674 at 680. Having placed and kept Lamb in a position to lure appellant, and having knowingly and willingly permitted and encouraged the scheme to continue to the completion of the crime, the government must also accept the responsibility for Lamb's success in creating the criminal intent. *Cermak v. United States* (CCA 6th, 1925) 4 F.(2d) 99.

POINT II.

THE INSTRUCTIONS OF THE COURT ON THE SUBJECT OF ENTRAPMENT WERE ERRONEOUS AND MISLED THE JURY.

The Court gave three separate instructions to the jury on the defense of entrapment. We will argue only the errors committed in the third instruction, "Second Supplemental Instructions To The Jury" (our Point 3 above), since this instruction compounded the errors previously committed, and the Court admonished the jury that, "so far as the law of entrapment is concerned, you need consider no other instruction". (R 342, 27-30.) The effectiveness of this admonishment may be gauged by the fact that the jury, having been deadlocked with no change in balloting for nearly twenty-four hours, proceeded to return verdicts of guilty in less than an hour. (R 341, 343.)

We submit that the "Second Supplemental Instructions To The Jury" was an erroneous and inaccurate statement of the law and contained a number of prejudicial errors:

(A) In the second paragraph of the instruction the Court said, "The prosecution contends that the defendant was merely afforded an opportunity to commit the crimes charged and that he had the intent or the willingness to commit them." (R 27.) We submit that there was no evidence, nor even any contention advanced by the prosecution, upon which to base such an instruction. The uncontradicted evidence was that Lamb was the instigator of the scheme throughout, and that appellant "didn't even know what illegal

fishing was" until approached by Lamb, the government agent. (R 240.) The facts bear no resemblance to those cases in which the government merely "affords an opportunity" to a criminal, or one intent on crime. Compare, *Louie Hung v. United States,* supra; *United States v. Spadafora,* supra. Appellant certainly evinced no "ready complaisance". Compare *United States v. Chiarella,* supra.

This vice was reiterated in the third paragraph of the instruction, where the Court said, "But while officers of the law may not thus entrap an innocent person into the commission of a crime they may, *if they are informed or suspect that a person has the intent or disposition to commit a crime,* not only afford him an opportunity to commit it but also may lay a trap for him by using a decoy or an artifice, stratagem or other means *and may actually solicit, encourage or cooperate with him in his commission of it".* (R 27.) (Emphasis supplied.) While such language might be proper in some cases, the facts here provided no such occasion. There was no evidence whatever that Lamb, or any other government agent, had any suspicion of appellant, or reason to suspect him, prior to the time when Lamb approached him and commenced his series of persuasions. (R 109-111.) Lamb admitted he had never had any conversations with appellant about fishing prior to July, 1950, and didn't know whether he had ever fished before 1950 or not. (R 109.) This is a far cry from such cases as *Cratty v. United States* (C.A.D.C. 1947) 163 F.(2d) 844, or *Kott v. United States* (C.A. 5th, 1947) 163 F.(2d) 984, where there

was reason to believe the defendant was already engaged in the illicit business, and such an instruction might have been proper.

(B) Continuing, the Court injected a new refinement into the law of entrapment by instructing the jury that even if the government agent originated the criminal scheme and accompanied it by "importunities, pleas or persuasion", it must further appear that such persuasion was "sufficient to overcome the will power and judgment" of the appellant before he could avail himself of the defense. (R 28, 29.) We have, after a careful search, been unable to find any authority for the addition of this purely subjective test to the defense of entrapment. Rather, the Courts appear to have left only objective fact questions to juries in these cases, i.e., whether the government agent was the originator of the scheme, or, whether the government agent did in fact persuade the defendant to commit the crime. We submit that the addition of this requirement by the Court placed a further burden on the defendant in making his defense; a burden which neither authority nor reason require him to bear.

(C) The Court, in effect, charged the jury that "a desire for personal gain" or "the fear of losing an opportunity for profit" would not be a sufficient inducement to give rise to the defense of entrapment. (R 28, 29.) Ignoring the fact that the government agent was the instigator of the crime, and disregarding the evidence of that agent's repeated solicitation, the Court said:

> "The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, *from a desire for personal gain or from the fear of losing an opportunity to profit* or whether his will power and better judgment were so overcome by Lamb, that he was induced to commit the crimes charged without having had any previous intention to do so." (R 29.)

The Court then stated an illustrative example to the jury, which was left with them as the definitive word on the subject:

> "To illustrate, if 'A', a custodian of government property, tells 'B' that he will allow him to steal for a percentage of the profits thereof, then there would be no entrapment even though 'A' told 'B' that it was an excellent opportunity for making a lot of money. On the other hand, if 'A' told 'B' that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced 'B' to steal for the accommodation of 'A' which otherwise 'B' would not have even contemplated, it would be entrapment."

We submit that the "desire for personal gain" and the "opportunity to profit" is one of the strongest "persuaders" or "lures" which a government agent could possibly use to incite an innocent, but ductile, person to undertake such a crime. "For the love of money is the root of all evil:" I Timothy 6:10. Such would seem to be the consistent view taken by the courts of the United States. In *Morie v. United States,*

supra, the government agent induced the defendant to sell heroin with which to dope horses in "fixed" races by painting a pretty picture of the "big money" to be made. The Court held that a motion to direct a verdict of acquittal should have been granted and reversed the conviction. See also, *Capuano v. United States* (CCA 1st, 1925) 9 F.(2d) 41 (lure was fear of losing alcohol permit, and fear of physical violence); *United States ex rel. Hassel v. Mathues,* supra (lure was hope of profits on illegal shipments of beer); *United States v. Intoxicating Liquors* (D.C. N.H. 1923) 290 Fed. 824 (lure was the opportunity for a "large sale"); *United States v. Polakoff* (CCA 2nd, 1941) 121 F.(2d) 333 (cash lure of $500.00; sufficient to go to the jury); *Weathers v. United States* (CCA 5th, 1942) 126 F.(2d) 118 (lure of "some money" to be paid for abortion; properly submitted to jury); *Meyer v. United States,* supra (no lure except profit on liquor sale; properly submitted to jury); *Woo Wai v. United States,* supra (lure was "scheme by which they could make some money"; must be properly submitted to jury).

As to the illustrative examples featuring "A" and "B", given by the Court, we submit that they were grossly inadequate to advise the jury properly and did not portray accurately the elements of entrapment which it was the duty of the jury to consider. We respectfully submit that the first example concerning "A" and "B" (R 29) *would* be entrapment even on the bare facts stated by the Court; *at the very least it would raise an issue of fact for a jury. Browne v.*

United States, supra; *Ybor v. United States* (CCA 5th, 1929) 31 F.(2d) 42. If we add other essential facts to the facts stated in the example, that "B" was an innocent person having no intention to steal government property, and that "A" urged the illegal scheme upon him "assiduously and persistently", then the illustration would certainly be a classic example of entrapment. Compare, *Woo Wai v. United States,* supra.

Concededly, the second illustration employed in the instruction is an example of entrapment, albeit an unusual one. The "lure" employed to entice an innocent person into crime may just as well be an appeal to sympathy as to cupidity. *Sorrels v. United States* (1932), supra (lure was an appeal to sentiment as a "war buddy"); *Butts v. United States,* supra, (lure was sympathy for the need of a fellow addict for dope); *United States v. Cerone* (CCA 7th, 1945) 150 F.(2d) 382 (lure was desire to escape military service); *Peterson v. United States,* supra (lure was sympathy). But this example bore no faint resemblance to the facts of the case before the jury, and it was clearly erroneous to convey the impression to the jury (as this instruction clearly did) that entrapment would exist *only* in circumstances similar to those stated in the example. In our opinion, the employment of these two examples in this instruction was equivalent to instructing the jury to bring in verdicts of guilty. The jury promptly did just that.

POINT III.

PROPOSED INSTRUCTIONS 1 AND 2 SUBMITTED BY THE DEFENDANT FAIRLY AND ACCURATELY STATED THE LAW OF ENTRAPMENT; IT WAS PREJUDICIAL ERROR TO REFUSE THESE INSTRUCTIONS.

The first proposed instruction requested by the defendant was a simple, concise and accurate statement of the law of entrapment. It was taken almost verbatim from the cases cited in support of it. (R 6-7.) In fact, the second paragraph of this instruction is an exact quotation of an instruction requested and refused by the trial Court in *Capuano v. United States,* 9 F.(2d) 41, at 42. Because of the failure to give this instruction that conviction was reversed and remanded. Ibid. Here the instruction was "refused because covered". In the light of our argument on the errors contained in the Second Supplemental Instructions, stated above, we cannot agree.

Because of the nature of the defense of entrapment, the defendant is entitled to have the jury instructed that it is incumbent upon the government to disprove the defense beyond a reasonable doubt. This was the effect of the defendant's second proposed instruction. It was refused "because there is no evidence that defendant was 'lured' ". (R 7.) We submit that there was ample evidence that defendant was "lured" and that the instruction requested was not adequately covered. It should have been given. *Ryles v. United States,* supra, (following instruction given, "the burden is upon the government to prove by competent evidence to the satisfaction of the jury

beyond a reasonable doubt that it was not entrapment".); *Patton v. United States* (CCA 8th, 1930) 42 F.(2d) 68; compare *Heath v. United States,* supra; *Gargano v. United States,* supra.

OTHER ERROR APPEARING OF RECORD.

THE COURT ERRED IN UNDULY RESTRICTING TESTIMONY AS TO THE BACKGROUND OF THE DEFENDANT AND THE ACTIVITIES OF THE GOVERNMENT AGENTS.

(a) Upon cross-examination of the appellant the United States Attorney was given considerable leeway in examining appellant as to his business activities and misdemeanors. (R 253, 255, 256.) Upon redirect examination by defense counsel the following colloquy occurred:

Q. Between that time and the time you came to Ketchikan, Alaska, where were you, Joe?

Mr. Baskin: Your Honor, I object to that. That is immaterial and irrelevant to the issues in this case.

Mr. Kay: I believe the occupation and the background of the defendant is something——

Mr. Baskin: It is not. I was impeaching the witness and——

Mr. Kay: Impeaching? By that kind of evidence? That certainly is incompetent. If that was the purpose of your examination. I object to it and ask that it be stricken.

The Court: Well, of course, that is not the purpose. It is merely to show the defendant's background so that the jury may appraise his testimony.

Mr. Kay: Yes, Sir; precisely.

Q. Well, where were you?

Mr. Baskin: Your Honor, I am objecting to that. It is immaterial and irrelevant as to where he was.

The Court: I think the question is too indefinite and that the objection should be sustained.

Q. Where did you go between your last conviction in 1943 and the——

Mr. Baskin: Your Honor, I object to that.

Q. And the time you arrived in Ketchikan, Alaska?

The Court: Objection sustained.

Q. Isn't it a fact that you served in the——

Mr. Baskin: Your Honor, I object to that.

Mr. Kay: Well, what in the world—I haven't asked the question.

Mr. Baskin: We know what you are going to ask.

A. Army.

The Court: Well, I assume you are asking him about military service which is improper. Objection sustained. (R 256-257.)

In the preliminary questions asked of appellant on direct examination the Court went so far as to *sustain objection to a question as to whether or not appellant was married.* (R 206-207.) Only the "wrong" side of appellant was permitted to be shown to the jury.

In an ordinary defense these matters might be considered collateral or immaterial; not so in a case

of entrapment. As the Supreme Court pointed out in the *Sorrells* case, supra, when a defendant relies upon entrapment he must expect "an appropriate and searching inquiry into his own conduct and predisposition as bearing on that issue". 287 U.S. 435, at 451. Surely that "searching inquiry" is properly directed at both the good and bad facets of defendant's life. From the opinion in the *Sorrells* case it appears that the defendant was a veteran of the World War and a former member of the 30th Division, A.E.F., was employed by the Champion Fibre Company at Canton, and had been "on his job continuously without missing a pay day since March, 1924." 287 U.S. 435, at 440. Had Sorrells been on trial in the District Court of Alaska, First Division, none of these facts would apparently have been admitted. See also on this issue, *Ryles v. United States* (C.A.10th, 1950) ("When the defense of entrapment is interposed, the predisposition and criminal design of the defendant becomes relevant and the government may introduce evidence relating to the conduct and the predisposition of the defendant as it bears upon the issue of entrapment. *The record and the reputation of the defendant become important upon this issue in rebuttal.*" 183 F.(2d) 944, at 945, emphasis supplied.) And see, *United States v. Becker,* supra, 62 F.(2d) 1007 at 1009. By these rulings, Defense counsel was seriously circumscribed in his efforts to present proper evidence as to the record

and background of the defendant. The elimination of such evidence was prejudicial error.

(b) So too, this Court and the jury might have had considerably more light on the activities of the government agents involved in this case had the Court permitted defense counsel to continue his examination of agent John Wendler concerning the contents of reports he had received from Warner. (R. 199-201.) Counsel was endeavoring to discover what Wendler had heard from his subordinates prior to laying the trap for the Rolling Wave. This was proper as bearing on whether appellant was entrapped. Compare the admission of hearsay in *Heath v. United States,* supra, 169 F.(2d) 1007 at 1010.

CONCLUSION.

1. The appellant was entitled to a judgment of acquittal at the close of the evidence. It had been conclusively established that the corrupt plan to steal fish and split the profits originated with John Lamb, an official agent of the United States, serving in an official function; that the government agents introduced this criminal design to appellant, then an innocent person having no intention to bribe any government official; that appellant was persuaded into the commission of the crime of bribery by the assiduous and persistent efforts of the government agent; and that the intention of the government agents who

were aware of the scheme, and who aided Lamb in completing it, was to arrest, prosecute and convict the appellant. The Court erred in refusing to direct a judgment of acquittal.

2. Assuming, *arguendo,* that some of the foregoing facts were sufficiently controverted to raise an issue for the jury, appellant was entitled to have the jury fairly and accurately instructed on the defense of entrapment. The instructions of the Court on this subject, and particularly the examples given to the jury in the Second Supplemental Instructions, were prejudicially erroneous, and require that the conviction be reversed.

3. The proposed instructions on behalf of the defendant, Nos. 1 and 2, were concise and accurate instructions on the subject of entrapment and the defendant was entitled to have the jury instructed accordingly. The material included in these instructions was not properly covered in the instructions which the Court gave.

4. The Court erred in preventing the appellant from introducing proper testimony as to his background and record, and in striking proper testimony as to the activities of the government agents. Every man has two sides to his character and record; by cutting off proper questions concerning the defendant, only a half picture of the defendant was displayed to the jury.

We respectfully submit that it would be "shocking to the sense of justice" and "against public policy"

to permit the judgment of conviction to stand. It should be reversed.

Dated, Anchorage, Alaska,
May 11, 1951.

Respectfully submitted,
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